

**United States Department of Labor
Employees' Compensation Appeals Board**

JAMES W. TURNER, Appellant)

and)

DEPARTMENT OF THE AIR FORCE,)
OKLAHOMA CITY AIR LOGISTICS CENTER,)
TINKER AIR FORCE BASE, OK, Employer)

**Docket No. 05-238
Issued: January 24, 2006**

Appearances:

James W. Turner, pro se

Catherine Carter, Esq., Office of Solicitor, for the Director

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge

DAVID S. GERSON, Judge

JURISDICTION

On November 2, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated August 24, 2004 which denied his request for a hearing. He also timely appealed a June 8, 2004 schedule award decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these issues.¹

ISSUES

The issues are: (1) whether appellant has more than a 23 percent binaural hearing loss, for which he received a schedule award; and (2) whether the Office properly denied appellant's request for a hearing under 5 U.S.C. § 8124(b)(1) on the grounds that his request was untimely filed.

¹ Appellant requested an oral argument before the Board and this was scheduled for December 15, 2005. However, he did not appear for the requested oral argument.

FACTUAL HISTORY

On November 6, 2003 appellant, then a 59-year-old aircraft engine mechanic and work inspector supervisor, filed an occupational disease claim for hearing loss caused by noise exposure in the course of his federal employment.² In support of his claim, appellant submitted documentation including audiograms, work history reports and a copy of a schedule award he received on June 27, 1985 for 13 percent loss of monaural hearing in the right ear.³

On January 22, 2004 the Office referred appellant along with a statement of accepted facts to Dr. Richard Dawson, a Board-certified otolaryngologist, for a second opinion evaluation.

In a March 4, 2004 report, Dr. Dawson noted appellant's history of injury and treatment, reviewed a March 2, 2004 audiogram performed for him and diagnosed bilateral sensorineural hearing loss. He noted that appellant's date of maximum medical improvement was March 2, 2004. Dr. Dawson opined that the sensorineural hearing loss was caused partly by noise exposure encountered in his federal employment. He utilized the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (5th ed. 2001) and opined that appellant had monaural impairment of 45 percent in the right ear and 20.25 percent in the left ear for a total employment-related binaural hearing loss of 24 percent. Dr. Dawson also recommended annual hearing tests, lip reading training and binaural hearing aids.

On March 17, 2004 the Office accepted appellant's claim for binaural hearing loss. The Office also advised him that his claim would be forwarded to an Office medical adviser for an assessment regarding his employment-related hearing loss.

In a March 26, 2004 report, which was based upon Dr. Dawson's March 4, 2004 report and the accompanying audiologic evaluation, the Office medical adviser applied the Office's standardized procedures and found that appellant suffered monaural hearing loss to the right ear of 45 percent and monaural hearing loss to the left ear of 20.6 percent, for a combined binaural loss of 25 percent. He noted that this was due to occupational noise to which appellant was exposed during his federal employment. Further, Dr. Dawson noted that hearing aids were authorized.⁴

On April 23, 2004 appellant filed a Form CA-7, claim for compensation, requesting a schedule award for his hearing loss.

The Office subsequently determined that appellant had previously received a schedule award for a 13 percent monaural hearing loss of the right ear and again referred the case to the Office medical adviser.

² The record reflects that appellant retired on September 2, 2003.

³ Claim No. 16-0088594.

⁴ The Office medical adviser also noted that the audiogram of March 2, 2004 was used as it met the Office standards and was used by Dr. Dawson.

The Office medical adviser determined that the 13 percent monaural loss which appellant had previously received was equivalent to a 2 percent binaural hearing loss and deducted that amount from the 25 percent calculation previously performed and determined that he was entitled to an additional award of 23 percent for binaural hearing loss.

By decision dated June 8, 2004, the Office granted appellant a schedule award for 23 percent binaural hearing loss for 46 weeks of compensation for the period March 2, 2004 to January 17, 2005.

By letter dated July 14, 2004, which was post-marked July 15, 2004, appellant requested a hearing.

By decision dated August 24, 2004, the Office denied appellant's request for a hearing. The Office found that he was not entitled a hearing because he had not requested the hearing within 30 days of the Office's June 8, 2004 decision. The Office considered appellant's request for a hearing and denied the request on the grounds that it could be equally well addressed by requesting reconsideration and submitting evidence not previously considered to establish that the claimed disability was greater than the percentage awarded.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act⁵ and its implementing regulation⁶ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of schedule members of functions of the body. However, the Act does not specify the manner, in which the percentage of loss shall be determined. For consistent result and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule loss.⁷

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.⁸ Using the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second, the losses at each frequency are added up and averaged.⁹ Then, the "fence" of 25 decibels is deducted because, as the A.M.A., *Guides* points out, losses below 25 decibels result in no impairment in the ability to hear everyday speech under everyday conditions.¹⁰ The remaining

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404 (2002).

⁷ *Id.*

⁸ A.M.A., *Guides* at 250 (5th ed. 2001).

⁹ *Id.*

¹⁰ *Id.*

amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.¹¹ The binaural loss is determined by calculating the loss in each ear using the formula for monaural loss; the lesser loss is multiplied by five, then added to the greater loss and the total is divided by six to arrive at the amount of the binaural hearing loss.¹² The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.¹³

ANALYSIS -- ISSUE 1

The Office medical adviser reviewed the results of audiometric testing performed on March 8, 2004 by Dr. Dawson, the second opinion physician and correctly applied the Office's standardized procedures. Testing for the right ear at frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed hearing losses of 45, 35, 50 and 90 decibels, respectively. These decibel losses were totaled at 220 decibels and divided by 4, to obtain the average hearing loss of 55 decibels. This average was then reduced by 25 decibels to obtain the average hearing loss of 30, which when multiplied by the established factor of 1.5 resulted in a 45 percent monaural loss. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 20, 25, 45 and 65, respectively. These decibel losses were totaled at 155 decibels and were divided by 4, to obtain the average hearing loss of 38.75 decibels. This average of 38.75 decibels, was then reduced by 25 decibels to equal 13.75, which when multiplied by the established factor of 1.5 resulted in a 20.6 percent hearing loss in the left ear. The 20.6 percent for the left ear, when multiplied by 5, yielded a product of 103. The 103 was then added to the 45 percent hearing loss for the right ear to obtain a total of 148. The 148 was divided by 6, in order to calculate a binaural loss of hearing of 24.666 percent, which when rounded up is equal to 25 percent.¹⁴

The Office medical adviser subsequently reviewed the previous award that appellant received for 13 percent monaural hearing loss in the right ear. He explained that this would equate to a two percent binaural hearing loss. The Office medical adviser determined this by multiplying 5 by 0 percent of the left and adding the 13 percent for the right ear and dividing that amount which was equivalent to 2.166 percent or 2 percent binaural hearing loss. He subtracted this amount from the 25 percent and determined that appellant was entitled to receive an additional award of 23 percent for his binaural loss of hearing.

Under the Act, the maximum award for binaural hearing loss is 200 weeks of compensation.¹⁵ Since the binaural hearing loss in this case is 23 percent, appellant would be entitled to 23 percent of 200 weeks or 46 weeks of compensation. His schedule award ran from

¹¹ *Id.*

¹² *Id.*

¹³ *Donald E. Stockstad*, 53 ECAB 301 (2002); *petition for recon. granted (modifying prior decision)*, Docket No. 01-1570 (issued August 13, 2002).

¹⁴ The Board notes that Dr. Dawson determined that appellant had a 24 percent binaural hearing loss and it appears that he may not have rounded up. The Board notes that the results would have been the same with rounding.

¹⁵ 5 U.S.C. § 8107(c)(13)(B).

March 2, 2004 to January 17, 2005, which equates to 46 weeks of compensation. There is no other medical evidence of record, conforming to the A.M.A., *Guides*, that establishes a greater hearing loss. The Office, therefore, properly determined the number of weeks of compensation, for which appellant is entitled under the schedule award.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b) (1) of the Federal Employees' Compensation Act¹⁶ dealing with a claimant's entitlement to a hearing before an Office hearing representative states that, [b]efore review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary. The Board has noted that section 8124(b)(1) is unequivocal in setting forth the limitation in requests for hearings.¹⁷

The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and the Office must exercise this discretionary authority in deciding whether to grant a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing; when the request is made after the 30-day period established for requesting a hearing; or when the request is for a second hearing on the same issue. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.¹⁸ Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts.¹⁹

ANALYSIS -- ISSUE 2

The Office properly determined appellant's July 14, 2004 request for a hearing which contained a postmark of July 15, 2004 was not timely filed as it was made more than 30 days after the issuance of the Office's June 8, 2004 decision. The Office, therefore, properly denied his hearing request as a matter of right.

The Office then proceeded to exercise its discretion, in accordance with Board precedent, to determine whether to grant a hearing in this case. The Office determined that a hearing was not necessary as the issue in the case was medical with regard to whether appellant's impairment

¹⁶ 5 U.S.C. § 8124(b)(1).

¹⁷ *Ella M. Garner*, 36 ECAB 238 (1984); *Charles E. Varrick*, 33 ECAB 1746 (1982).

¹⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, Hearings and Reviews of the Written Record, Chapter 2.1601.4(b)(3) (June 1997).

¹⁹ *Cleo R. Hatch*, 49 ECAB 636 (1998).

was greater than the percentage awarded and that it could be resolved through the submission of medical evidence in the reconsideration process. Therefore, the Office properly denied his request for a hearing as untimely and properly exercised its discretion in determining to deny appellant's request for a hearing as he had other review options available. There is no evidence that the Office abused its discretion in denying appellant's request for a hearing.

CONCLUSION

The Board finds that appellant has failed to establish that he has more than a 23 percent binaural loss of hearing for which he received a schedule award. The Board further finds that the Office did not abuse its discretion in denying appellant's request for a hearing.

ORDER

IT IS HEREBY ORDERED THAT the August 28 and June 8, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 24, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board